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No.____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

SAMUEL HECHT,

Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTIONS PRESENTED

1. DOES THE FIFTH AMENDMENT RIGHT TO BE TRIED ONLY ON A GRAND JURY INDICTMENT PERMIT A DEFENDANT TO BE TRIED AND CONVICTED OF AN OFFENSE NOT ALLEGED IN THE INDICTMENT?

2. CAN A CONVICTION FOR AIDING AND ABETTING THE COMMISSION OF THE CRIME STAND WHEN THERE WAS NO EVIDENCE PRESENTED AT TRIAL THAT A DEFENDANT TOOK AFFIRMATIVE ACTION TO MAKE THE CRIME SUCCEED?

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

Petitioner seeks a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion and order of the United States District Court for the Eastern District of Pennsylvania (Broderick, J.) is appended (App. A-1). Following judgment of sentence a direct appeal was taken to the United States Court of Appeals for the Third Circuit.

The judgment order of the United States Court of Appeals for the Third Circuit is as yet unreported but is appended (App. A-13). The Court of Appeals denied a request for rehearing en banc by an Order dated February 18, 1986 (App. A-15), which is as yet unreported.

JURISDICTION

A judgment of sentence was imposed on June 5, 1985 by the United States District Court from which direct appeal was taken to the Court of Appeals.

The judgment order of the Court of Appeals was entered on January 14, 1986 (App. A-13). A petition for rehearing en banc was denied on February 18, 1986 (App. A-15). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT

Petitioner Samuel Hecht, together with five other persons, was the subject of an indictment returned on March 14, 1984 in the United States District Court for

the Eastern District of Pennsylvania, being charged in Counts 1 and 9 thereof with violating, respectively, 21 U.S.C. §846, and 21 U.S.C. §952(a) and 18 U.S.C. §2(a).[1]

The controlled substances alleged were methamphetamine and phenyl-2-propane ("P-2-P"), both Schedule II non-narcotic substances. P-2-P is a precursor chemical necessary to manufacture methamphetamine.

The evidence at trial was that in 1978 Ronald Raiton ("Raiton") and Joseph DeSantis ("DeSantis") formed a criminal organization engaged in the purchase on a massive scale, from various foreign countries, of various controlled substances and precursor chemicals and their wholesale distribution in the United States. The major product handled by the Raiton-DeSantis organization, under the primary supervision of Ronald Raiton, was P-2-P, which was not placed on the controlled substances list until February 11, 1980, 38 F.R. 28821.

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1. 21 U.S.C. §846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

This statute is located in Subchapter I — Control and Enforcement (21 U.S.C. §§801-904) of the Comprehensive Drug Abuse Prevention and Control Act of 1970.

21 U.S.C. §952(a), which is found in Subchapter II — Import and Export (21 U.S.C. §§951-970) of the Act, provides in pertinent part:

> (a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter. . .

18 U.S.C. §2(a) provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

On September 7, 1979 Joseph Gomberg, an employee of the Raiton-DeSantis organization, was arrested by agents of the Drug Enforcement Administration, and seized with him were documents revealing the existence and operation of the dummy corporation which served as Raiton's cover for the importation of P-2-P from Europe into Canada and thence into the United States (C.A. App. 69a; 391a).

Several days thereafter, needing a new cover for the P-2-P operation, Raiton approached petitioner, who was an attorney who had represented Raiton for years on legitimate matters. Raiton offered petitioner $5,000.00 per fifty-five gallon drum of P-2-P to be imported into the United States under the aegis of a new, Canadian corporation which petitioner would form for that purpose. Petitioner agreed to Raiton's proposal and thereafter, through the offices of an attorney in Toronto, Canada, caused the incorporation of Toro International Trading Co., Inc. ("Toro").

The Toro operation involved Raiton's employee Albert Spielvogel ("Spielvogel") travelling to Nassau in the Bahamas, in the spring of 1980, with copies of the corporate documents of Toro in order to open an account in the Nassau office of a Canadian bank and arrange for the issuance of letters of credit to pay for the P-2-P ordered from European chemical suppliers (C.A. App. 323a-327a). Spielvogel was unsuccessful in opening a bank account in Toro's name in Nassau and had to use his own name. Nothing that petitioner did with respect to setting up Toro was ever used by Spielvogel in the Bahamas (C.A App. 325a; 377a).

Petitioner's participation in Raiton's P-2-P operation after the date that P-2-P was placed on the controlled substances list, February 11, 1980, was limited to receiving money from Raiton in December of 1980 as payment for setting up Toro, which had ceased to be active months before, and agreeing to serve as a reference for

"Albert McCarter" and "David Trumpet," aliases respectively for Spielvogel and Raiton, when Spielvogel leased a warehouse for the P-2-P in Florida using those names. Petitioner never actually provided such a reference.

After the close of the evidence, the trial judge charged the jury in pertinent part as follows:

> So, what about Count One? Well, Count One charges this Defendant with a conspiracy. A conspiracy in violation of 21 United States Code, Section 846. And that's the Section that makes it a crime to conspire, to manufacture, to distribute a controlled substance, to possess a controlled substance with intent to distribute *or to import a controlled substance with the — into the United States* in violation of 21 United States Code, Section 841(a) and Section 952(a).
>
> * * *
>
> So, a conspiracy is a kind of partnership in criminal purposes in which each member becomes the agent of every other member in the conspiracy. And the gist of the offense is a combination or an agreement to disobey or disregard the law. In this case, *the unlawful purposes charged in the indictment are* the manufacture of methamphetamine, the distribution of methamphetamine, *the importation of P-2-P in the United States*, the distribution of, and possession of P-2-P in the United States.
>
> * * *
>
> The Government has the burden of establishing beyond a reasonable doubt that the Defendant was aware of the basic purpose and object of the conspiracy and that *he entered into the conspiracy with a specific criminal intent to do what the law forbids, that is in this case, with a purpose to import P-2-P into the United States* or to distribute P-2-P for the purpose of manufacturing or distributing methamphetamine.

(C.A. App. 473a; 476a; 479a-480a) (emphasis added).

The conspiracy crime which petitioner was convicted of, 21 U.S.C. §846, does not proscribe a conspiracy to import a controlled substance into the United States; such a conspiracy is proscribed rather by 21 U.S.C. §963.[2]

REASONS FOR GRANTING THE WRIT

I. THE FIFTH AMENDMENT RIGHT TO BE TRIED ONLY ON A GRAND JURY INDICTMENT DOES NOT PERMIT A DEFENDANT TO BE TRIED AND CONVICTED OF AN OFFENSE NOT ALLEGED IN THE INDICTMENT.

The crime with which petitioner was charged in Count I of the grand jury's indictment proscribed a conspiracy to commit any of the substantive offenses defined in subchapter I (Control and Enforcement) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, codified at 21 U.S.C. §§841-848 inclusive. However, the trial court charged the jury on a conspiracy to commit a crime *not* defined in subchapter I, but instead a crime defined in subchapter II (Import and Export) of the Act, namely, a conspiracy to import a controlled substance into the United States. The trial court in effect charged the jury as if petitioner had been indicted under 21 U.S.C. §963 rather than §846, and the jury accordingly was instructed on and permitted to convict petitioner based upon his participation in a conspiracy to

2. 21 U.S.C. §963 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescibed for the offense, the commission of which was the object of the attempt or conspiracy.

This statute is located in Subchapter II — Import and Export, of the Comprehensive Drug Abuse Prevention and Control Act of 1970.

import a controlled substance, which the grand jury never changed. The Third Circuit affirmed.

The decision of the court below conflicts with the decisions of this Court which hold that "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him," *Stirone v. United States*, 361 U.S. 212, 217 (1960), *citing Ex Parte Bain*, 121 U.S. 1 (1887). As early as the *Bain* case this Court held that a court may not "change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes," 121 U.S. at 10. This aspect of *Bain* has continuing validity; *see, e.g., Stirone v. United States, supra, United States v. Miller*, ____ U.S. ____105 S.Ct. 1811 (1985).

Stirone was a Hobbs Act prosecution wherein the indictment alleged only that the defendant obstructed interstate commerce by interfering with the importation of sand into Pennsylvania. The trial court allowed evidence and charged the jury that it could convict the defendant (1) if sand to make concrete had been shipped from another state into Pennsylvania, *or* (2) if that concrete was used to construct a steel mill, the output of which would be shipped out of Pennsylvania. This Court reversed the Third Circuit's affirmance of the trial court and held that it was reversible error to allow evidence and charge the jury as to the uncharged prospective steel shipments, citing *Bain*:

> The *Bain* case, which has never been disapproved, stands for the rule that *a court cannot permit a defendant to be tried on charges that are not made in the indictment against him.*
>
> * * *

> *[I]t cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment that the grand jury returned.*

Stirone, 361 U.S. at 317 (emphasis added). In *Miller v. United States*, *supra*, this Court held that a defendant may be properly convicted based upon trial proof that supports a defendant's participation in a narrower, though included, fraudulent scheme than that alleged in the indictment. In so doing the Court distinguished and reaffirmed *Stirone* and *Bain:*

> In *Stirone* the offense proved at trial was *not* fully contained in the indictment, for trial evidence had "amended" the indictment by *broadening* the possible basis for conviction from that which appeared in the indictment. [emphasis in original].
>
> * * *
>
> In contrast to Stirone, Miller was tried on an indictment that clearly set out the offense for which he was ultimately convicted. *His complaint is not that the indictment failed to charge the offense for which he was convicted, but that the indictment charged more than was necessary.*
>
> * * *
>
> Most generally, *Bain* stands for the proposition that *a conviction cannot stand if based on an offense that is different from that alleged in the grand jury's indictment.*
>
> * * *
>
> [We] do not limit *Bain's* more general proposition concerning the *impermissibility of actual additions to the offenses alleged in an indictment, a proposition we have repeatedly reaffirmed.*

United States v. Miller, ____U.S. ____, 105 S.Ct. 1816, 1817, 1818, 1820 (emphasis added). It is submitted that the Third Circuit has overlooked this crucial difference

between *Miller* and *Stirone*. As in *Stirone*, and in contrast to *Miller*, the trial court below permitted petitioner to be convicted of a crime *for which he was never charged*, namely, a conspiracy to import a controlled substance. Petitioner's complaint, unlike Miller's, is precisely that "the indictment fails to charge the offense for which he was convicted," *Miller*, 105 S.Ct. at 817.

Since the Third Circuit below decided this case in a way which clearly conflicts with the relevant decisions of this Court cited above, it is respectively urged that the instant petition should be granted.

II. A CONVICTION FOR AIDING AND ABETTING THE COMMISSION OF A CRIME CANNOT STAND WHEN THERE IS NO EVIDENCE PRESENTED AT TRIAL THAT A DEFENDANT TOOK AFFIRMATIVE ACTION TO MAKE THE CRIME SUCCEED.

In order to properly convict petitioner of the aiding and abetting count, the Government had to prove below beyond a reasonable doubt that in or about the Spring of 1980 petitioner aided and abetted the importation of a controlled substance into the United States from a place without, 21 U.S.C. §952(a); 18 U.S.C. §2(a). In *Nye & Nissen v. United States*, 336 U.S. 613 (1949), this Court accepted Learned Hand's now-celebrated formulation, expressed in *United States v. Peoni*, 100 F.2d 401 (2nd Cir. 1938), as to the elements of a violation of 18 U.S.C. §2(a):

> In order to aid and abet another to convict a crime it is necessary that a defendant "in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek *by his action* to make it succeed." [Citation omitted].

Nye & Nissen, supra, 336 U.S. at 619 (emphasis added). Necessarily, "the existence of the crime is an

element of the offense of aiding and abetting," *United States v. McCoy*, 539 F.2d 1050, 1064 (5th Cir.), *cert. den.* 431 U.S. 919 (1977).

In the instant case, the substantive crime which petitioner was accused of aiding and abetting, 21 U.S.C. §952, has two elements: (1) importation into the United States from a place without, (2) of a controlled substance. If an imported substance is *not* controlled, a violation of this statute could not have occurred. Since P-2-P became controlled on February 11, 1980, only *actions* of petitioner on or after that date which aided or abetted the importation of P-2-P into the United States could form the basis for an aiding and abetting conviction.

Viewed in the light most favorable to the Government, the only evidence of any action by Hecht after February 11, 1980 was that thereafter he received money as payment for services previously performed in setting up Toro in the fall of 1979, and that he agreed to serve as a reference for the aliases employed by Raiton and Spielvogel in leasing the Florida warehouse in March of 1980.

As to the first point, the passive receipt of money for the work previously performed in setting up a corporation to import material which was legal at the time the corporation was set up is not the affirmative conduct necessary to support an aiding and abetting conviction. Indeed, the receipt of money by petitioner did not aid or abet anything, and research has failed to disclose any case holding that the receipt of money for legal work previously performed constitutes aiding or abetting of an ongoing crime.

As to the second point, although petitioner agreed to serve as a reference, if needed, for the lease of the Florida warehouse the record reveals that no such reference call was ever made and that petitioner did not in fact serve as such a reference. Again, this is not the *action* necessary to support an aiding and abetting conviction.

Accordingly, the Third Circuit's decision is in conflict with the relevant decision of this Court as to the elements which must be proved in order to establish a conviction of 18 U.S.C. §2.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Neil E. Jokelson, Esquire
Counsel for Petitioner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	CRIMINAL NO.
	:	84-110-04
SAMUEL HECHT	:	

MEMORANDUM

BRODERICK, J. June 4, 1985

The indictment in this case charged the defendant in Count I with participating in a P2P-methamphetamine conspiracy masterminded by the drug-dealer-turned-government informant, Ronald Raiton, and in Count II with aiding and abetting the importation of P2P into the United States. When Mr. Hecht and his five co-defendants were called to trial in October of 1984, this Court granted Mr. Hecht a severance on the basis of his doctor's representation that Mr. Hecht was hospitalized and that a lengthy trial would risk irreparable damage to his health at that time. Trial was rescheduled for April 8, 1985, when this Court held a hearing and made the determination that a trial would not be life-threatening for Mr. Hecht, nor would it pose an unreasonable risk to Mr. Hecht's health. *See* Memorandum and Order dated April 11, 1985. After a trial lasting approximately one week, the jury found Mr. Hecht guilty on Count I of conspiracy to import phenyl-2-propanone (P2P) into the United States, to possess with intent to distribute P2P, and to manufacture and distribute methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 846, & 952(a), and guilty on Count IX of aiding and abetting the importation

of P2P into the United States in violation of 21 U.S.C. § 952(a) and 18 U.S.C. § 2(a).

The defendant has filed a motion for judgment of acquittal, or, in the alternative, a new trial, on the grounds that the evidence produced at trial was insufficient to support a guilty verdict and that various errors in the Court's charge to the jury deprived the defendant of a fair trial. For the reasons hereinafter set forth, Mr. Hecht's motion will be denied.

On a motion for judgment of acquittal pursuant to Fed.R.Cr.P. 29, the Court is "required to view the evidence in the light most favorable to the prosecution and to draw all reasonable inferences therefrom in the prosecution's favor." *United States v. Ashfield*, 735 F.2d 101, 106 (3d Cir. 1984) (citing *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469 (1942)). Viewing the evidence in this light, the trial court is obligated to uphold the verdict unless no rational jury could conclude beyond a reasonable doubt that the government has proved all of the elements of the crime charged. *Id. See also Burks v. United States*, 437 U.S. 1, 16-17, 98 S.Ct. 2141, 2149-50 (1978); *United States v. Doan*, 710 F.2d 124, 126-27 (3d Cir. 1983). On the other hand, a motion for a new trial under Fed.R.Cr.P. 33 on the ground that the verdict is against the weight of the evidence is directed to the sound discretion of the trial court, which may weigh the evidence but may set aside the verdict and grant a new trial only if it determines that the verdict constitutes a miscarriage of justice. *United States v. Pfifer*, 400 F. Supp. 719, 722-23 (E.D. Pa. 1975), *aff'd* 532 F.2d 748 (3d Cir. 1976). The Court must also grant a new trial if there is a reasonable probability that trial error could have had a substantial influence on the jury's decision. *See Government of Virgin Islands v. Bedford*, 671 F.2d 758, 762 (3d Cir. 1982); *United States v. Mastro*, 570 F. Supp. 1388, 1390 (E.D. Pa. 1983). In the present case, the evidence was amply sufficient to support the jury's verdict on Counts I and IX under both the

Rule 29 and the Rule 33 standards, and the defendant's contentions of error in the charge to the jury are meritless.

Sufficiency of the Evidence

The evidence produced at trial showed the following: In 1978, Ronald Raiton and Joseph DeSantis co-founded a drug empire of international dimensions. DeSantis was already involved in the manufacture of methamphetamine from chemicals obtained in the United States. Ronald Raiton was at that time a self-employed international trade broker. In early 1978, Mr. DeSantis engaged Ronald Raiton to join him and to handle the job of obtaining P2P, an essential chemical in the manufacture of methamphetamine. P2P did not become a controlled substance until February 12, 1980, but even prior to that time, it was illegal to possess P2P for the purpose of manufacturing methamphetamine. Because the Drug Enforcement Administration (DEA) monitored Ronald Raiton's purchases of P2P from chemical companies within the United States, Raiton sought and found P2P sources in Europe. Raiton began importing P2P from England, France, and Germany by way of Florida and then by way of Canada. In September of 1979, the DEA seized documentation of the company which served as Raiton's Canadian conduit. Desiring a new cover for the importation of P2P, Ronald Raiton turned to the defendant, Samuel Hecht.

Mr. Hecht, a Philadelphia attorney, had previously been retained by Raiton for legal representation of a legitimate nature. Mr. Hecht had visited the offices from which Ronald Raiton conducted his drug business and had observed illegal drugs and large quantities of cash in the office. Mr. Hecht had expressed an interest in sharing in the profits of Raiton's illegal drug business. Ronald Raiton offered Samuel Hecht a share of the profits if Hecht would form a new Canadian corporation to serve

the Raiton organization's needs in terms of P2P importation. Raiton and Hecht discussed the legality of P2P importation, and Mr. Hecht knew that it was illegal to import P2P for the purpose of manufacturing methamphetamine, as he knew Raiton was doing. Raiton and Hecht agreed that in return for forming a Canadian corporation which could not be traced to Raiton or his associates as individuals, Hecht would receive $5000.00 per barrel of P2P imported through the corporation.

In August or September of 1979, Mr. Hecht retained Sheldon Goodman, a Canadian attorney one year out of law school, to incorporate TORO International Trading Co., Inc. (TORO). Mr. Hecht told Mr. Goodman that Hecht had clients in the United States who desired to form a Canadian corporation for the purpose of importing chemicals used to make soaps and detergents. Mr. Hecht knew that the sole purpose for incorporating TORO was to order, import, and pay for P2P from Europe, and that the P2P was to be used in the manufacture of methamphetamine.

Sheldon Goodman incorporated TORO in September 1979, and transferred the corporation to two Bahamian corporations, whose names were provided by Mr. Hecht, as shareholders. These corporations were controlled by Ronald Raiton and used to hide drug profits. Mr. Goodman set his fee at $800.00, but, at Mr. Hecht's request, agreed to charge $1200.00, which would include a referral fee for Mr. Hecht. On September 19, 1979, Mr. Hecht sent Mr. Goodman a $300.00 retainer for the incorporation of TORO. Although Mr. Goodman sent several notices of overdue payment, he never received any further payment for his services. In January of 1980, Mr. Hecht advised Mr. Goodman that the owners of TORO did not intend to use the corporation at that time, but they wished to keep it in existence in case they

decided to use it in the future. At Mr. Hecht's request, Mr. Goodman sent copies of the articles and other corporate documents to Mr. Hecht on February 1, 1980.

At that time Ronald Raiton's associate, Albert Spielvogel, was making arrangements for the importation of P2P into the Bahamas. Mr. Hecht gave the corporate articles and documents to Raiton and Spielvogel so that Spielvogel could accomplish this importation under the TORO name. Because the P2P was shipped from the Bahamas to Florida, the organization needed to store P2P in Florida before transporting it to Philadelphia. When Raiton and Spielvogel tried to lease warehouse space in Florida under the aliases David Trumpett and Albert McCarter, the lessor required verification of their names. They presented a counterfeit driver's license for David Trumpett and gave Samuel Hecht's name as a reference. The warehouse space was leased to McCarter and Trumpett on March 10, 1980. In about April or May 1980, Raiton purchased his own boat to transport P2P from the Bahamas to Florida. At that point, he stopped using the TORO name, told Mr. Hecht that he was no longer in "the business", and terminated his relationship with Mr. Hecht. In all, 5 or 6 barrels of P2P were imported through TORO, commencing late in 1979, the last one having been imported in April or May of 1980. Samuel Hecht received payments totaling $25,000.00 to $30,000.00 in return for these 5 or 6 barrels at various times in 1980, the last payment taking place in December of 1980.

In Count I, Mr. Hecht was charged with participating in a conspiracy to commit the substantive offenses of manufacturing and distributing methamphetamine, possessing P2P with intent to distribute, and distributing P2P in violation of 21 U.S.C. § 841(a)(1), and importing P2P into the United States in violation of 21 U.S.C. § 952(a). The indictment charged that the conspiracy existed from in or about March 1978 until in or about

April of 1982, and that the entire conspiracy was a violation of 21 U.S.C. § 846. The Court instructed the jury that P2P became a controlled substance on February 11, 1980 and further stated,

> If you find that the defendant was implicated solely in the possession, importation, and distribution of P2P before February 11, 1980, the defendant cannot be found guilty, unless he knew that the P2P was to be used in the manufacture and/or distribution of methamphetamine and he joined the conspiracy with the intent of carrying out that illegal purpose.

See United States v. Gomberg, 715 F.2d 843, 847 (3d Cir. 1983) (approving a substantially identical charge).

In effect, the defendant contends that evidence of a conspiracy to import P2P could not properly be considered by the jury on Count I as charged in the indictment, and that there was insufficient evidence to find that the defendant participated in a conspiracy to commit any of the other offenses charged in the indictment. The basis for defendant's contention that Count I does not properly charge a conspiracy to import is a technical one: Section 846 criminalizes conspiracy to commit any of the crimes defined in subchapter I of the Drug Abuse and Prevention Act, 21 U.S.C. §§ 841-48, such as manufacturing or delivering a controlled substance. *See* 21 U.S.C. § 841(a)(1). The crime of importation of a controlled substance appears in subchapter II of the Act, 21 U.S.C. §§ 951-966, specifically in section 952. Conspiracy to commit a subchapter II crime is prohibited by section 963. Section 963 is identical to section 846 *except* that section 846 is applicable to the crimes defined in subchapter I and section 963 is applicable to the crimes defined in subchapter II.

Mr. Hecht's argument that the evidence is insufficient to support a guilty verdict on the section 846 conspiracy charged in Count I must fail for several reasons. First, charging the wrong conspiracy section number for

a drug conspiracy has been held a technical and harmless error, in view of the identical language of the two sections. The Fifth Circuit has held that charging a violation of section 963 for a conspiracy which correctly falls under section 846 was harmless error. *United States v. Martinez*, 496 F.2d 664, 669 (5th Cir. 1974), *cert. denied*, 419 U.S. 1057 (1974). The Court explained that the indictment "contains the elements of the offense intended to be charged; it sufficiently apprises the defendants of what they must be prepared to meet, and protects them from being again put in jeopardy for the same offense." *Id.* (citations omitted). *Accord*, *United States v. Rios*, 611 F.2d 1335, 1338 n.2 (10th Cir. 1970), *cert. denied*, 452 U.S. 918 (1981) (section 846 charged for conspiracy to import, rather than section 963). Based on this reasoning, this Court ruled at the close of the prosecution's case that dismissal of the indictment was improper, and that amendment of the indictment was unnecessary. For the same reasons, defendant's motion for acquittal or a new trial on Count I is denied.

A second reason the defendant is not entitled to acquittal or a new trial on Count I relates to the fact that P2P was not a controlled substance, and therefore importation of P2P was not a subchapter II (section 952) crime, prior to February 11, 1980. As the Third Circuit explained in *Gomberg*, conspiracy to import or distribute P2P prior to that date was punishable only if the defendant knew that the P2P would be used in the manufacture of methamphetamine and intended to aid that purpose. 715 F.2d at 847. In effect, the conspiracy to import P2P prior to February 11, 1980 could not be charged under section 963 or punished at all unless there was also a conspiracy to manufacture methamphetamine, which is properly charged as a section 846 crime, within subchapter I. *See* 21 U.S.C. § 841(a)(1).

Finally, and most importantly, even if Hecht's actual activities in furtherance of the conspiracy were limited to

the importation of P2P, he can still be found to have participated in the charged conspiracy to import P2P, to possess with intent to distribute and distribute P2P, and to manufacture and distribute methamphetamine. The Court instructed the jury that it need not find that Mr. Hecht had full knowledge of all of the details of the conspiracy or that he had knowledge of all of the other members of the conspiracy in order to find that he became a member of the conspiracy charged in Count I. However, the Court went on to state that in order to find that Mr. Hecht became a member of the conspiracy, it must find that he was aware of the basic purpose and object of the conspiracy, that is, to import P2P for the purpose of manufacturing or distributing methamphetamine, and that he entered into the conspiracy with a specific criminal intent to further that basic purpose or object. *See Gomberg*, 715 F.2d at 847 (a defendant may be found guilty of conspiracy if he joined with knowledge of its "essential nature"; he need not have full knowledge of all details of the alleged unlawful scheme) (citations omitted). The evidence was more than sufficient to support the jury's verdict that Samuel Hecht knew that the basic purpose of the charged conspiracy was to import P2P for the manufacture and distribution of methamphetamine, and that he willfully joined the conspiracy with an intent to further that basic purpose.

The evidence produced by the Government at trial was also more than sufficient to support the jury's verdict of guilty on Count IX, which charged the defendant with aiding and abetting the importation of P2P into the United States from a place outside thereof in or about the Spring of 1980, in violation of 21 U.S.C. § 952(a) and 18 U.S.C. § 2(a). The Court instructed the jury that in order to return a verdict of guilty on Count IX, it must find beyond a reasonable doubt (1) that one or more persons imported P2P into the United States from a place outside thereof in or about the Spring of 1980 and after February 11, 1980, and (2) that the defendant willfully aided and

abetted the commission of that importation in or about the Spring of 1980 and after February 11, 1980. The defendant contends that the only evidence of his affirmatively aiding and abetting P2P importation was the incorporation of TORO in the early fall of 1979. He argues that this activity cannot be considered aiding and abetting the importation of P2P in the Spring of 1980. However, the defendant cites no authority for the proposition that the aiding and abetting activity must take place within a specifically limited amount of time before the actual commission of the crime. In fact, the authority relied upon by the defendant specifically states that aiding and abetting "assumes some participation in the criminal act in furtherance of the common design, either *before* or at the time the act is committed." *Snyder v. U.S.*, 448 F.2d 716, 718 (8th Cir. 1971) (quoting *Johnson v. United States*, 195 F.2d 673, 675 (8th Cir. 1952)) (emphasis added). The *Snyder* court goes on to state, "By far the most important element [of aiding and abetting] is the sharing of the criminal intent of the principal. . . ." In this case, there was strong evidence of Mr. Hecht's sharing in the criminal intent to import P2P both before and after February 1980. His affirmative conduct in setting up TORO was, in a sense, ongoing. Once in existence as a mechanism for importing P2P, TORO could be used in any manner the organization felt was expedient to accomplish this result. In a case such as this, the Court is unwilling to rule that the incorporation activity could not as a matter of law be considered the aiding and abetting of P2P in the Spring of 1980.

The circumstance of the change in the law to classify P2P as a controlled substance as of February 11, 1980 presents an additional wrinkle in this case. However, the jury was charged on Count I that it had to find Mr. Hecht was aware of the basic purpose of the conspiracy to return a verdict of guilty, and the jury did make that finding. There was abundant evidence produced at trial to support the finding that the defendant

was aware that the basic purpose of the conspiracy was to import P2P to be used in the manufacture and distribution of methamphetamine. Because importation of P2P with knowledge and intent that it be so used was prohibited prior to February 11, 1980, there does not appear any possibility that the defendant could have been surprised or prejudiced by the change in the law.

However, the court does not have to go even that far in order to uphold the verdict as to Count IX because there is evidence that Mr. Hecht continued to actively aid and abet the importation of P2P after February 11, 1980. As stated above, in January of 1980, Mr. Hecht wrote Mr. Goodman to request that he allow TORO to remain in existence in an inactive state, so that Mr. Hecht's clients would be able to utilize the corporation in the future. At Mr. Hecht's request, Mr. Goodman mailed copies of the corporate articles and other corporate documents on February 1, 1980. Mr. Hecht subsequently gave these documents to Raiton and Spielvogel for Spielvogel to use in arranging for P2P importation from the Bahamas. Raiton continued to import P2P into the Bahamas through TORO until April or May of 1980, and Samuel Hecht received $5000.00 for each barrel, the last payment being made in December 1980. In addition, there is evidence that Mr. Hecht provided a reference for Raiton and Spielvogel to obtain a warehouse lease under the aliases Trumpett and McCarter at some time around March 10, 1980.

For all of these reasons, the defendant's motions for acquittal or a new trial on the basis of sufficiency of the evidence are denied.

The Charge To The Jury

With one exception, defendant's contentions of error in the Court's charge to the jury simply restate the defense position on sufficiency of the evidence. Because these arguments were discussed at length and rejected

above, they do not warrant further discussion. The final contention is that the Court erred in refusing to charge the jury that

> When two alternative explanations for a person's conduct exist, one of which is consistent with guilt and one of which is consistent with innocence, you must accept that explanation which is consistent with innocence. In other words, you may not speculate as to guilt where there is an explanation for conduct which is just as consistent with innocence.

The Court's charge to the jury regarding the Government's burden to prove each and every element of the crimes charged beyond a reasonable doubt was more than adequate. Several of the courts which have considered the requested charge have concluded that it may mislead the jury as to the Government's burden of proof beyond a reasonable doubt. *See e.g. United States v. Rucker*, 586 F.2d 899, 904 (2d Cir. 1978) (citations omitted); *United States v. Pera*, 527 F.2d 1356, 1365 (5th Cir. 1976).

In conclusion, none of the defendant's contentions of error, single or collectively, is of sufficient substance to merit any further discussion as a basis for granting a new trial in this case.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	CRIMINAL
	:	NO. 84-110-04
SAMUEL HECHT	:	

ORDER

AND NOW, this 4 day of June, 1985, upon consideration of the defendant's motion for judgment of acquittal or, in the alternative, a new trial, for the reasons stated in this Court's Memorandum of June 4, 1985,

IT IS HEREBY ORDERED that the defendant's motion for judgment of acquittal or, in the alternative, a new trial is DENIED.

RAYMOND J. BRODERICK, J.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1377

UNITED STATES OF AMERICA

v.

SAMUEL HECHT,

Appellant

(Criminal Action No. 84-00110-04 — E.D.Pa.)
District Judge: Honorable Raymond J. Broderick

Submitted Under Third Circuit Rule 12(6)
January 13, 1986

BEFORE: SEITZ, GIBBONS, *Circuit Judges*, and BARRY, *District Judge.**

JUDGMENT ORDER

After consideration of the contentions raised by appellant, to-wit, that (1) the lower court erred in permitting appellant to be convicted of a crime other than those charged in the indictment, and in charging the jury to that effect and (2) the evidence presented at trial was not legally sufficient to convict appellant of the crimes actually charged in the indictment, it is

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*Honorable Maryanne Trump Barry, United States District Judge for the District of New Jersey.

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

_____

ATTEST:

_____

Sally Mrvos, Clerk

DATED: January 14, 1986

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1377

UNITED STATES OF AMERICA

v.

SAMUEL HECHT,

Appellant

(Criminal Action No. 84-00110-04 — E.D. of Pa.)

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, *Circuit Judges* and BARRY, *District Judge.**

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

Circuit Judge

DATED: February 18, 1986

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*Honorable Maryanne Trump Barry, United States District Judge for the District of New Jersey, sitting by designation.